

9-16-04

2661  
PATENT 41

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
(MBHB Case No. 03-507-B)

In the Application of:

Timothy W. Dygert, et. al.

Serial No. 09/478,407

Filed: January 6, 2000

For: Multi-Channel Video Pump

Group Art Unit: 2661

Examiner: David R. Vincent

TRANSMITTAL LETTER

Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

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SEP 21 2004  
Technology Center 2600

Sir:

1. We are transmitting herewith the attached papers for the above identified patent application:
  - a. Resubmission of Power of Attorney;
  - b. Copy of Previously Submitted Transmittal Letter;
  - c. Copy of Previously Submitted Power of Attorney by Assignee of Entire Interest;
  - d. Copy of Asset Purchase Agreement by and Between Digital Networks North America, Inc., as Purchaser and Escient Convergence Corp., as Seller Dated as of April 22, 2003;
  - e. Copy of Stamped Return Receipt Postcard; and
  - f. Return Receipt Postcard.
2. With respect to fees:
  - a. No fee is due at this time.
  - b. Please charge any additional fees or credit overpayment to Deposit Account No. 13-2490. A duplicate copy of this sheet is enclosed.
3. CERTIFICATE OF MAILING UNDER 37 CFR § 1.10: The undersigned hereby certifies that this Transmittal Letter and the paper, as described in paragraph 1 hereinabove, are being deposited with the United States Postal Service with sufficient postage as "Express Mail Post Office to Addressee," in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on September 15, 2004 Express Mail No. EV334696654US.

Respectfully submitted,

Brian R. Harris  
Reg. No. 45,900

Dated: September 15, 2004



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Technology Center 2600

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
(Case No. 03-507-B)

In re Application of:

Timothy W. Dygert

Serial No.: 09/478,407

Filed: January 6, 2000

For: Multi-Channel Video Pump

Group Art Unit: Not Assigned

Examiner: Not Assigned

TRANSMITTAL LETTER

Commissioner for Patents  
P.O. Box 1450  
Alexandria Virginia 22313-1450

Dear Sir:

In regard to the above identified application,

1. We are transmitting herewith the attached:

- a) Power of Attorney
- b) Asset Purchase Agreement By and Between Digital Networks North America, Inc. and Escient Convergence Corp.
- c) Postcard.

2. With respect to fees:

- a) No fee is required.
- b) Please charge any underpayment or credit any overpayment our Deposit Account, No. 13-2490.

Respectfully submitted,

Dated: July 22, 2003

  
Enrique Perez  
Registration No. 43,853

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SEP 21 2004

Technology Center 2600

Hon. Commissioner of  
Patents and Trademarks

Serial No. 09/478,407

Atty EP:hm

Re: Applicant - Timothy W. Dygert

Case No. 03-507-B

Multi-Channel Video Pump

Sir:

Please place the Patent Office receipt stamp hereon and mail to acknowledge receipt of:

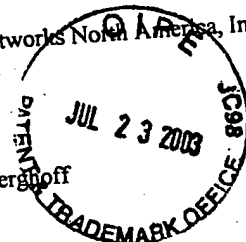
- a) Transmittal Letter;
- b) Power of Attorney; and
- c) Asset Purchase Agreement By and Between Digital Networks North America, Inc. and Escient Convergence Corp.

Fee Enclosed

\$ \_\_\_\_\_

Date Deposited: July 23, 2003

Respectfully,  
McDonnell Boehnen Hulbert & Berghoff  
Attorney for Applicant



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**ASSET PURCHASE AGREEMENT**

**BY AND BETWEEN**

**DIGITAL NETWORKS NORTH AMERICA, INC., AS PURCHASER**

**AND**

**ESCIENT CONVERGENCE CORP., AS SELLER**

**DATED AS OF APRIL 22, 2003**

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## **ASSET PURCHASE AGREEMENT**

**THIS ASSET PURCHASE AGREEMENT ("Agreement")** is entered into and made effective as of this 22nd day of April, 2003 by and between Digital Networks North America, Inc., a Delaware corporation ("Purchaser") and Escient Convergence Corp., a Delaware corporation ("Seller").

### **WITNESSETH:**

**WHEREAS**, Seller operates a business based in Indianapolis, Indiana that outsources the development of, and markets and distributes, specific media management to dealers primarily in the CEDIA, PARA and HTSA distribution channels (the "Business") and Purchaser desires to purchase from Seller, and Seller desires to sell to Purchaser, the Acquired Assets (as hereinafter defined) upon the terms and subject to the conditions set forth in this Agreement (the "Acquisition");

**WHEREAS**, OpenGlobe, Inc., a Delaware corporation ("OG"), operates a business based in Indianapolis, Indiana that designs, develops and licenses convergence architectures and software for third party original equipment manufacturers of consumer electronics (the "OG Business") and, Purchaser, in connection with its purchase of the Acquired Assets from Seller, desires to purchase from OG, and OG desires to sell to Purchaser, substantially all of the assets of OG (the "OG Acquired Assets"), upon the terms and conditions of a separate Asset Purchase Agreement being signed contemporaneously herewith by Purchaser and OG (the "OG Purchase Agreement"); and

**WHEREAS**, the Boards of Directors of Purchaser and Seller and the required shareholders of Seller have deemed it desirable, advisable and in the best interests of their respective corporations that the transactions contemplated by this Agreement and the Related Agreements (as hereinafter defined) be consummated and, in furtherance hereof and thereof, have approved this Agreement and the Related Agreements to which they are a party and the transactions contemplated hereby and thereby;

**NOW, THEREFORE**, in consideration of the foregoing and of the mutual representations, warranties, covenants and agreements herein contained, and intending to be legally bound, the parties hereto agree as follows:

### **AGREEMENT**

#### **ARTICLE I.** **DEFINITIONS**

For purposes of this Agreement, the following capitalized terms shall have the following meanings (such meanings applicable to both the singular and plural forms of the terms defined):

"Accounts Payable" means all of Seller's accounts payable which (i) are in existence on the Closing Date and (ii) were included in the February Statement of Net Assets or were incurred in the Ordinary Course of Business between the date of the February Statement of Net Assets and the Closing Date; provided that, the term "Accounts Payable" shall not include any accounts payable of Seller with respect to any Person other than those listed on Schedule 2.04(iii).

"Accounts Receivable" means all accounts receivable, notes and all other amounts receivable by Seller from third parties, whether or not in the Ordinary Course of Business, and the benefit of all security for such accounts or debts, together with all unpaid financing thereof; excluding, however, any receivables owed to Seller by any of its Affiliates, any rights to refunds of Taxes, and any rights to refunds or payments with respect to any of the Excluded Assets.

"Accrued Expenses" means all accrued expenses and other liabilities and obligations of Seller which (i) are in existence on the Closing Date and (ii) were included in the February Statement of Net Assets or were incurred in the Ordinary Course of Business between the date of the February Statement of Net Assets and the Closing Date; provided that, the term "Accrued Expenses" shall not include any category of accrued expense, liability or obligation of Seller other than those categories listed on Schedule 2.04(v).

"Acquired Assets" means those assets of Seller being conveyed to Purchaser pursuant to this Agreement, as specified in Section 2.01 of this Agreement, including those assets set forth on Schedule 2.01 of this Agreement.

"Actions" has the meaning specified in Section 4.19.

"Additional Consideration" has the meaning specified in Section 2.06(c).

"Affiliate" means any Person that (i) directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Seller or (ii) that, together with Seller, is a member of a controlled group (within the meaning of Code Section 1563(a) determined without regard to Code Sections 1563(a)(4) and 1563(e)(3)(C)). As used in clause (i) of this definition, "control" (including, its correlative meanings "controlled by" and "under common control with") means possession, directly or indirectly, of power to direct or cause the direction of management or policies (through ownership of twenty percent (20%) or more of outstanding voting securities or partnership or other ownership interests, by contract or otherwise).

"Agreement" means this Asset Purchase Agreement.

"Asset Purchase Price" has the meaning specified in Section 2.05.

"Assigned Contracts" means those contracts, agreements and other arrangements (including the IP Licenses) listed on Schedule 1.01 of this Agreement. The fact that any Assigned Contract listed on Schedule 1.01 has not been formally assigned to Purchaser prior to the Closing shall not affect its treatment as an "Assigned Contract" under the provisions of this Agreement.

"Assignment and Assumption Agreement" has the meaning specified in Section 3.02(e).

"Assumed Liabilities" has the meaning specified in Section 2.04.

"Auditors" has the meaning specified in Section 2.06(a).

"Benefit Plans" has the meaning specified in Section 4.13(a).

"Bill of Sale" has the meaning specified in Section 3.02(d).

"Book Value Deficiency" has the meaning specified in Section 2.06(b).

"Book Value Surplus" has the meaning specified in Section 2.06(c).

"Business" has the meaning specified in the Recitals to this Agreement.

"Business Day" means any day, other than a Saturday or Sunday, on which commercial banks in the City of New York are open for business.

"Business IP" has the meaning specified in Section 2.01(f).

"CERCLA" means the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended.

"Claim" has the meaning specified in Section 7.01.

"Closing" has the meaning specified in Section 3.01.

"Closing Date" has the meaning specified in Section 3.01.

"Closing Refund" has the meaning specified in Section 2.06(b).

"Closing Statement of Net Assets" has the meaning specified in Section 2.06(a).

"COBRA" means Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

"COBRA Beneficiaries" has the meaning specified in Section 6.03.

"COBRA Coverage" has the meaning specified in Section 6.03.

"Code" means the Internal Revenue Code of 1986, as amended.

"Consents to Assignment" has the meaning specified in Section 3.02(m).

"Consulting Agreement" has the meaning specified in Section 3.02(k).

"Covenant Not to Compete" has the meaning specified in Section 3.02(h).

"OG" has the meaning specified in the Recitals to this Agreement.

"OG Acquired Assets" has the meaning specified in the Recitals to this Agreement.

"OG Business" has the meaning specified in the Recitals to this Agreement.

"OG Purchase Agreement" has the meaning specified in the Recitals to this Agreement.

"Employment Agreements" has the meaning specified in Section 3.02(g).

"Encumbrances" means all liens (statutory or other), leases, mortgages, pledges, security interests, conditional sales agreements, charges, claims, options, easements, rights of way (other than easements of record) and other encumbrances of any kind or nature whatsoever.

"Environmental Requirements" means all past, present and future Laws, rules, regulations, ordinances, policies, guidance documents, approvals, plans, authorizations, licenses or permits issued by any Governmental Entity and all judicial, administrative, and regulatory decrees, judgments, and orders relating to human health, pollution, or protection of the environment (including ambient air, surface water, ground water, land surface or surface strata), including: (i) Laws relating to emissions, discharges, releases, or threatened releases of Hazardous Materials; (ii) Laws relating to the identification, generation, manufacture, processing, distribution, use, treatment, storage, disposal, recovery, transport or other handling of Hazardous Materials; (iii) CERCLA, the Toxic Substances Control Act, as amended, the Hazardous Materials Transportation Act, as amended, RCRA, the Clean Water Act, as amended, the Safe Drinking Water Act, as amended, the Clean Air Act, as amended, the Atomic Energy Act of 1954, as amended, and the Occupational Safety and Health Act, as amended; and (iv) any similar Law.

"Equipment and Machinery" means (i) all equipment, machinery, furniture, fixtures and improvements, tooling, spare parts, supplies, computer hardware and software and vehicles owned by Seller, (ii) any rights of Seller to warranties applicable to the foregoing (to the extent assignable), and licenses received from manufacturers and sellers of any such item; and (iii) any related claims, credits, and rights of recovery with respect thereto.

"ERISA" has the meaning specified in Section 4.13(a).

"Escrow Agent" has the meaning specified in Section 3.04(c).

"Escrow Agreement" has the meaning specified in Section 7.04(b).

"Escrow Deposit" has the meaning specified in Section 3.04(c).

"Excluded Assets" has the meaning specified in Section 2.03.

"February Balance Sheet" has the meaning specified in Section 4.05.

"February Balance Sheet Date" has the meaning specified in Section 4.05.

"February Statement of Net Assets" has the meaning specified in Section 2.06(a).

"Files and Records" means all files, records and other information of Seller relating to the Business or any of the Acquired Assets, whether in hard copy or magnetic or other format, including customer and supplier records, equipment maintenance records, plant plans, equipment warranty information, specifications and drawings, sales and advertising material, computer software, correspondence, manuals, studies, sales literature and promotional material and copies of financial and accounting records.

"Former Seller Employees" has the meaning specified in Section 6.02.

"Furniture, Equipment and Systems Letter Agreement" has the meaning specified in Section 3.02(n).

"GAAP" means generally accepted accounting principles in the United States of America, in effect from time to time, consistently applied.

"Governmental Entity" means any court, government agency, department, commission, board, bureau or instrumentality of the United States of America, any local, county, state, federal or political subdivision thereof, or any foreign governmental body of any kind.

"Guaranty" has the meaning specified in Section 3.03(m).

"Hazardous Materials" means (i) any substance that is or becomes defined as a "hazardous substance," "hazardous waste," "hazardous material," pollutant, or contaminant under any Environmental Requirements, including CERCLA, the Superfund Amendments and Reauthorization Act, as amended, RCRA, and any analogous and applicable Law; (ii) petroleum (including crude oil and any fraction thereof); and (iii) any natural or synthetic gas (whether in liquid or gaseous state).

"Indemnified Party" has the meaning specified in Section 7.03(a).

"Indemnifying Party" has the meaning specified in Section 7.03(a).

"Intangible Assets" means all intangible personal property rights of Seller, including, without limitation, the benefit of third party representations, warranties and guarantees, customer lists and related information (including telephone numbers, facsimile numbers, addresses and e-mail addresses), supplier lists and related information (including telephone numbers, facsimile numbers, addresses and e-mail addresses), business plans and strategies, referral sources, and all other intangible assets of Seller.

"Intech Letter Agreement" has the meaning specified in Section 3.02(f).

"Intellectual Property" means any and all rights in, arising out of, or associated therewith, with respect to the following: (i) all US, state and foreign patents and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof throughout the world; (ii) all inventions (whether patentable or not), invention disclosures, improvements, discoveries, designs (including hardware systems and services designs), methods, techniques, research and development, business plans and strategies, supplier lists, referral sources, trade secrets, proprietary information, processes or formulae, franchises,

licenses, know how, technology, technical data and customer lists; (iii) all copyrights and works of authorship in any media, copyright registrations and applications therefor and all other rights corresponding thereto throughout the world; (iv) all trade names, logos, source indicators, common law trademarks and service marks, trademark and service mark registrations and applications therefor and all goodwill associated therewith throughout the world; (v) all databases and data collections and all rights therein throughout the world; (vi) all computer software including all source code, object code, load module, business requirements, functional specifications, algorithms, display screens, layouts, firmware, applications, interfaces, development tools, files, records and data, all media on which any of the foregoing is recorded, all Web addresses, sites and domain names; (vii) any similar, corresponding or equivalent rights to any of the foregoing; (viii) all tangible embodiments of and documentation related to any of the foregoing; and (ix) all rights to bring an action at law or in equity for the infringement of any of the foregoing prior to the Closing Date, including the right to receive all proceeds and damages therefrom.

**"Infringe"** means to infringe, misappropriate, dilute, impair or otherwise violate.

**"Inventories"** means all inventories of Seller, wherever located, including all finished goods, works in process, raw materials, recyclable materials, spare parts, replacement parts and all other materials, supplies and other items of personal property to be used or consumed by Seller in the operation of the Business, and any rights of Seller or an Affiliate to the warranties received from suppliers and any related claims, credits, rights of recovery and setoff with respect to such Inventories, but only to the extent such rights are assignable.

**"IP Licenses"** has the meaning specified in Section 4.11(e).

**"Key Employees"** has the meaning specified in Section 3.02(g).

**"Knowledge of Seller"** and words of similar import means, collectively, the actual knowledge of Seller's officers and directors on the Closing Date.

**"Law"** means any local, county, state, federal, foreign or other law, statute, regulation, ordinance, rule, order, decree, judgment, consent decree, settlement agreement or governmental requirement enacted, promulgated, entered into, agreed or imposed by any Governmental Entity.

**"Liability"** means, with respect to any Person, any liability or obligation of such Person of any kind, character or description, whether known or unknown, absolute or contingent, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, executory, determined, determinable or otherwise and whether or not the same is required to be accrued on the financial statements of such Person.

**"Licenses and Permits"** means all governmental licenses, consents, orders, permits, franchises, certificates, approvals and authorizations that relate directly or indirectly to, or are necessary or desirable for, the conduct of the Business by Seller or the ownership and operation of the Acquired Assets by Seller.

**"Material Adverse Effect"**, (x) when used with respect to Seller, the Business or the Acquired Assets, means any event, change, occurrence, condition or circumstance, including as a

result of any adverse determination in any pending litigation against Seller or OG, which has had or reasonably can be expected to have a materially adverse impact on (i) the validity of this Agreement or the execution, delivery or performance of this Agreement by Seller or the consummation of the transactions contemplated hereby by Seller or otherwise on Seller's ability to transfer and convey the Acquired Assets as contemplated by this Agreement, (ii) on the Business and the OG Business, taken as a whole, or (iii) on the Acquired Assets and the OG Acquired Assets, taken as a whole, and, (y) when used with respect to Purchaser, means any event, change, occurrence, condition or circumstance, including as a result of any adverse determination in any pending litigation against Purchaser, which has had or reasonably can be expected to have a materially adverse impact on (i) the validity of this Agreement or the execution, delivery or performance of this Agreement by Purchaser or the consummation of the transactions contemplated hereby by Purchaser or otherwise on Purchaser's ability to purchase the Acquired Assets as contemplated by this Agreement, or (ii) the operations or financial condition of Purchaser and its subsidiaries, taken as a whole.

"Material Contracts" has the meaning specified in Section 4.16(a).

"Net Book Value" has the meaning specified in Section 2.06(a).

"New Purchaser Employees" has the meaning specified in Section 6.02 of this Agreement.

"Non-Competition and Option Agreements" has the meaning specified in Section 3.02(i).

"Non-Competition and Option Employees" has the meaning specified in Section 3.02(i).

"Notice of Dispute" has the meaning specified in Section 2.06(d).

"Option Agreements" has the meaning specified in Section 3.02(l).

"Option Employees" has the meaning specified in Section 3.02(l).

"Ordinary Course of Business" means any action taken by a Person if (i) such action is consistent in nature, scope and magnitude with the past practices of such Person and is taken in the ordinary course of the normal day-to-day operations of such Person; (ii) such action does not require authorization by the board of directors or the shareholders of such Person (or by any Person or group of Persons exercising similar authority) and does not require any other separate or special authorization of any nature; and (iii) such action is similar in nature, scope and magnitude to actions customarily taken, without any separate or special authorization, in the ordinary course of the normal day-to-day operations of other Persons that are in the same line of business as such Person.

"PTO" has the meaning specified in Section 4.11(a).

"Permitted Encumbrances" means (a) liens for Taxes (other than income Taxes) that are not yet due and payable, (b) workers', repairmen's, and similar liens imposed by Law that have been incurred in the Ordinary Course of Business consistent with past practices, relating to obligations as to which there is no material default on the part of Seller, (c) the terms and

conditions of the Assigned Contracts, and (d) and certain other Encumbrances, in each case as set forth in Schedule 1.03 of this Agreement.

"Person" means any individual, corporation, partnership, joint venture, association, limited liability company, joint-stock company, trust, or unincorporated organization, or any Governmental Entity, officer, department, commission, board, bureau, or instrumentality thereof.

"Policy" has the meaning specified in Section 4.15(a).

"Purchaser" has the meaning specified in the first paragraph of this Agreement.

"Purchaser's 401(k) Plan" has the meaning specified in Section 6.04(a) of this Agreement.

"RCRA" means the Resource Conservation and Recovery Act, as amended.

"Registered IP" has the meaning specified in Section 4.11(a).

"Related Agreements" means the Bill of Sale, the Assignment and Assumption Agreement, the Intech Letter Agreement, the Escrow Agreement, and any other agreement by and among the parties hereto executed on or about the Closing Date relating to the subject matter hereof. When referenced with respect to a particular Person, the term "Related Agreements" means the Related Agreements to which such Person is a party.

"Seller" has the meaning specified in the first paragraph of this Agreement.

"Seller's 401(k) Plan" has the meaning specified in Section 6.04(a) of this Agreement.

"Survival Period" has the meaning specified in Section 7.04(a).

"Systems" has the meaning specified in Section 4.11(g).

"Tax" means any federal, state, local and foreign tax (including any excise tax, value added tax, occupancy tax, employment tax, unemployment tax, ad valorem tax, custom duty, transfer tax, or fee), levy, impost, fee, imposition, assessment or other governmental charge of any nature imposed upon a Person including any tax or governmental charge imposed upon any of the personal properties, real properties, tangible or intangible assets, income, receipts, payrolls, transactions, stock transfers, capital stock, net worth or franchises of a Person (including any sales, use, withholding or other tax which a Person is required to collect and/or pay over to any Governmental Entity), and all related additions to tax, penalties or interest thereon.

"Tax Return" means any return, report, information return, or other document (including all related and supporting information) filed or required to be filed with any Governmental Entity in connection with the determination, assessment, collection, or administration of any Tax.

"Third Party" means any Person other than the parties hereto and their respective successors, assigns and Affiliates.

**ARTICLE II.**  
**PURCHASE AND SALE OF ASSETS**

**Section 2.01. Purchase and Sale of Assets.** Upon the terms and subject to the conditions set forth in this Agreement, and in reliance on the representations and warranties contained herein, Purchaser hereby purchases, acquires and accepts from Seller, and Seller hereby sells, transfers, assigns, conveys and delivers to Purchaser, all of Seller's right, title and interest in and to all of the properties, assets, and interests in properties and assets (whether tangible or intangible) of any kind, nature, character and description owned by Seller on the Closing Date and relating to the Business, whether personal or other, whether accrued, contingent or other, and wherever situated, and whether or not reflected in any financial statement of Seller, other than the Excluded Assets (the "Acquired Assets"). The Acquired Assets shall include, but shall not be limited to, the following assets:

- (a) all Accounts Receivable other than any such Accounts Receivable due from Affiliates;
- (b) all Inventories;
- (c) all Equipment and Machinery;
- (d) all rights in, to and under the Assigned Contracts and all outstanding offers or solicitations made by or to Seller to enter into any contract to sell products or services in the Ordinary Course of Business of Seller;
- (e) all Intangible Assets (other than Intangible Assets included in the Excluded Assets);
- (f) all Intellectual Property owned or, subject to the terms and conditions of the applicable IP Licenses, used by Seller that relates to the Business (the "Business IP");
- (g) all Files and Records (other than Files and Records included in the Excluded Assets);
- (h) all Licenses and Permits, to the extent assignable without any consents or approvals of any Governmental Entity;
- (i) all claims of Seller against third parties relating to the Acquired Assets, whether choate or inchoate, known or unknown, contingent or non-contingent; and
- (j) the goodwill of the Business.

A list setting forth all material items of tangible personal property included in the Acquired Assets is attached hereto as Schedule 2.01.

**Section 2.02. Intentionally Deleted.**

**Section 2.03. Certain Excluded Assets.** Notwithstanding any other provision of this Agreement to the contrary, the Acquired Assets shall not include the following assets of Seller, which shall remain the sole property of Seller (collectively, the "Excluded Assets"):

- (a) all cash on hand or on deposit;
- (b) all rights of Seller to deposits, prepaid expenses, security deposits, claims for refunds and rights to offset in respect thereof;
- (c) all financial statements, Tax Returns and other Tax records and related information of Seller;
- (d) all insurance policies owned or maintained by Seller and all rights to make claims thereunder;
- (e) Seller's franchise to a corporation, stock transfer records, minute books and corporate seal (if any);
- (f) all shares of capital stock of Seller held in treasury (if any);
- (g) all personnel records and other records (if any) that Seller is, in each case, required by Law to retain in its possession;
- (h) all rights in, to and under any contracts, licenses or leases to which Seller is a party (other than the Assigned Contracts);
- (i) all Accounts Receivable and notes receivable due from Affiliates of Seller;
- (j) all rights, causes of action and claims of Seller under or pursuant to the terms and conditions of this Agreement or any of the Related Agreements; and
- (k) all other properties and assets expressly designated on Schedule 2.03(k) as Excluded Assets.

Notwithstanding anything in this Section 2.03 to the contrary, after the Closing, Purchaser shall be entitled, upon reasonable advance notice and at reasonable times, to inspect and copy any records and information retained by Seller which are reasonably necessary for the ongoing operation of the Business.

**Section 2.04. No Assumption of Liabilities.** Purchaser shall not assume, pay, satisfy, discharge, perform or be responsible for in any manner, and will not, by virtue of the execution and delivery of this Agreement, any Related Agreement or any other agreement, instrument or document delivered pursuant to or in connection with this Agreement or any Related Agreement (or otherwise by reason of or in connection with the consummation of the transactions contemplated hereby or thereby) be deemed to have assumed or to have agreed to pay, satisfy, discharge or perform or be responsible for in any manner, any liabilities, obligations or commitments of Seller of any nature whatsoever, whether direct or indirect, known or unknown, choate or inchoate, absolute, fixed, contingent or otherwise and whether or not

disclosed to Purchaser, including, without limitation, any indebtedness for borrowed money or any related interest charges, other than (a) as specifically set forth in this Agreement or any Related Agreement and (b) the following obligations and liabilities, for which Purchaser hereby assumes and agrees to be solely responsible for on and after the Closing Date (collectively, the liabilities and obligations specified in the foregoing clauses (a) and (b) are referred to as the "Assumed Liabilities"):

(i) All liabilities and obligations of Seller under the provisions of the Assigned Contracts;

(ii) All customer and original equipment manufacturer warranty liabilities and obligations of Seller with respect to Seller's sale of products or services (which are related to the Acquired Assets) prior to the Closing;

(iii) All Accounts Payable;

(iv) All COBRA, severance and accrued vacation obligations that Purchaser agrees to assume pursuant to Sections 6.02, 6.03 and 6.04 of this Agreement; and

(v) All Accrued Expenses.

**Section 2.05. Asset Purchase Price.** The aggregate consideration payable by Purchaser in consideration of the sale, transfer, assignment, conveyance and delivery by Seller of the Acquired Assets, in addition to the assumption of the Assumed Liabilities, shall be the sum of one million five hundred thousand United States dollars (\$1,500,000) (the "Asset Purchase Price"), which Purchaser shall pay to the parties specified in, and in accordance with, Article III. The Asset Purchase Price is subject to adjustment in accordance with Section 2.06.

**Section 2.06. Post-Closing Adjustment.**

(a) Within thirty (30) days after the Closing Date, Seller shall furnish or cause its independent accountants (the "Auditors") to furnish to Purchaser, at Seller's sole cost and expense, an unaudited statement of assets acquired from Seller and liabilities assumed from Seller (the difference between the two being referred to hereinafter as the "Net Book Value") as of the Closing Date (the "Closing Statement of Net Assets"), together with a written notice stating whether there is a Book Value Deficiency or Book Value Surplus, as each term is defined below, and, if applicable, specifying the amount thereof. The Closing Statement of Net Assets shall be prepared in a manner consistent with the February Balance Sheet and GAAP as applied in the preparation of the February Balance Sheet, except that, as reflected in the February Statement of Net Assets attached hereto as Exhibit 2.06 (the "February Statement of Net Assets"), (i) only the Acquired Assets shall be included as assets and (ii) only the Assumed Liabilities shall be included as liabilities, and in the case of the foregoing clauses (i) and (ii) only to the extent they constitute assets or liabilities in accordance with GAAP as applied in the preparation of the February Balance Sheet. Notwithstanding any of the foregoing to the contrary, for purposes of preparing the Closing Statement of Net Assets, no amounts shall be included as liabilities with respect to severance or termination payments due to any employees,

under any employment agreement or otherwise, as a result of the termination of their employment with Seller or Purchaser in connection with the transactions contemplated hereby. After the Closing, Purchaser shall allow Seller and the Auditors access to such books and records that were transferred to Purchaser by Seller at the Closing as Seller or the Auditors may reasonably require for the preparation of the Closing Statement of Net Assets.

(b) If the Net Book Value of Seller reflected on the Closing Statement of Net Assets is less than the Net Book Value of Seller reflected on the February Statement of Net Assets (the amount of such difference being the "Book Value Deficiency"), Purchaser shall be entitled to obtain payment of an amount of cash equal to the Book Value Deficiency from the Escrow Deposit (the "Closing Refund"), in accordance with the terms of the Escrow Agreement, in complete satisfaction and discharge of Seller's obligation to pay any such Closing Refund.

(c) If the Net Book Value reflected on the Closing Statement of Net Assets is greater than the Net Book Value of Seller reflected on the February Statement of Net Assets (the amount of such difference being the "Book Value Surplus"), Purchaser shall pay additional consideration (the "Additional Consideration") to Seller, in cash, in an amount equal to the Book Value Surplus.

(d) If Purchaser disputes any item(s) on the Closing Statement of Net Assets, Purchaser shall notify Seller in writing thereof (the "Notice of Dispute") within thirty (30) days after Seller's or the Auditor's delivery of the Closing Statement of Net Assets to Purchaser, which Notice of Dispute shall set forth in reasonable detail the items in dispute, the basis for dispute and the amounts being disputed. If Purchaser fails to deliver a Notice of Dispute within the aforesaid thirty (30)-day period, the Closing Statement of Net Assets shall become final and binding upon, and non-appealable by, all Parties at the end of such period and any Closing Refund or Additional Consideration reflected by the Closing Statement of Net Assets shall be promptly paid or otherwise satisfied and discharged pursuant to Section 2.06(b) or Section 2.06(c), as applicable.

(e) If Purchaser timely delivers a Notice of Dispute to Seller, Purchaser and Seller shall attempt in good faith to resolve such dispute(s). If Purchaser and Seller are unable to resolve any disputed item(s) within ten (10) Business Days after Seller's receipt of the Notice of Dispute, such disputed item(s) shall be submitted within five (5) days after the expiration of such ten (10) Business Day period to one of the "Big 4" accounting firms which is independent of Purchaser and Seller and not heretofore engaged by any party, chosen with the mutual consent of Purchaser and Seller. This accounting firm shall be instructed to resolve such disputed term(s) based upon the presentations of Purchaser and Seller, and in accordance with the terms and conditions of this Agreement, within twenty (20) days after the initial submission as aforesaid. The resolution of disputes by the accounting firm so selected shall be set forth in-writing and shall become final and binding upon, and non-appealable by, all Parties, and the Closing Statement of Net Assets, adjusted to reflect the impact, if any, thereon as a result of the resolution of such disputes, shall become final and binding upon the date of such resolution. The costs and

expenses of such resolution, including, without limitation, the costs and fees of the efforts of the accounting firm retained to resolve such dispute, shall be paid by the losing Party.

**Section 2.07. Subsequent Documentation.** At any time and from time to time after the Closing Date, Seller shall, upon the request of Purchaser, and Purchaser shall, upon the request of Seller, without any additional consideration, promptly execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered, such further instruments and other documents, and perform or cause to be performed such further acts, as may be reasonably required to evidence or effectuate (a) the sale, conveyance, transfer, assignment and delivery hereunder of the Acquired Assets, (b) the assumption of the Assumed Liabilities, (c) the payment of any Closing Refund or Additional Consideration, (d) the performance by the parties of any of their other respective obligations under this Agreement or any of the Related Agreements, and (e) the purposes and intent of this Agreement and the Related Agreements.

**Section 2.08. Allocation of the Purchase Price.** Purchaser and Seller agree that the Asset Purchase Price shall be allocated to the Acquired Assets as set forth on Schedule 2.08 and that they shall file Internal Revenue Service Form 8564 (and/or other appropriate Tax Returns) with the applicable Taxing authorities, and shall not file any amendments or take any action inconsistent with the foregoing in any audit, refund claim, Tax Return, or any other administration or judicial proceeding, pursuant to Section 1060 of the Code and the underlying Treasury Regulations promulgated thereunder. Each of the parties hereto shall make their respective Tax Returns (and any amendments thereof) available for inspection by the other parties hereto for the purpose of verifying compliance with this Section 2.08.

**Section 2.09. Taxes.** Seller shall pay all Taxes arising out of (a) its ownership, possession and use of the Excluded Assets; (b) its ownership, possession and use of the Acquired Assets prior to the Closing Date, including all income and personal property Taxes due and payable (or assessed for periods) on or before the Closing Date; (c) gains from the sale of the Acquired Assets to Purchaser; and (d) the transfer, recording, sales and use Taxes arising out of the sale or transfer of the Acquired Assets pursuant to this Agreement or the other agreements and instruments contemplated hereby. Purchaser shall pay all Taxes arising out of its ownership, possession, use and subsequent transfer of the Acquired Assets on and after the Closing Date.

**Section 2.10. Fair Consideration.** Each of the parties acknowledges and agrees that the consideration provided for in this Article II represents fair consideration and reasonable equivalent value for (a) the sale and transfer of the Acquired Assets and (b) the transactions, covenants and agreements set forth in this Agreement and the Related Agreements, which consideration was agreed upon as the result of arm's-length and good-faith negotiations among the parties and their respective representatives.

### **ARTICLE III.** **CLOSING**

**Section 3.01. Closing Date.** Except as otherwise provided for in this Agreement, the closing of the transactions contemplated by this Agreement and the Related Agreements (the "Closing") is being held simultaneously with the execution and delivery of this Agreement at the offices of Ice Miller, One American Square, 34<sup>th</sup> Floor, Indianapolis, Indiana, on April 22, 2003.

(the "Closing Date"), it being agreed and understood between the parties hereto that the receipt by Purchaser of any portion of the Asset Purchase Price specified in Section 3.04 after the Closing Date pursuant to wire transfer instructions dated no later than the Closing Date shall be deemed to have been received by Purchaser on the Closing Date. All of the agreements, documents, certificates and instruments to be delivered by each party at the Closing shall be deemed and acknowledged by the parties hereto to have been delivered simultaneously on their respective dates.

**Section 3.02. Deliveries by Seller.** Seller is delivering (or is causing to be delivered) to Purchaser, simultaneously with the execution of this Agreement, possession of all of the Acquired Assets and is delivering (or is causing to be delivered) to Purchaser originals or copies, if specified, of the following agreements, documents, certificates, instruments and other items:

(a) Copies of the corporate resolutions adopted by the Board of Directors and the shareholders of Seller authorizing and approving the execution and delivery of this Agreement, the Related Agreements and the other agreements and instruments contemplated hereby and thereby, and the consummation of the transactions contemplated hereby and thereby, certified to be true, complete, correct and in full force and effect as of the Closing Date by the corporate Secretary of Seller;

(b) A Certificate of Good Standing of Seller issued by the Secretary of State of Delaware, dated within ten (10) days of the Closing Date;

(c) A copy of the Certificate of Incorporation of Seller, including all amendments thereto, certified as true, complete and correct as of a date within ten (10) days of the Closing Date by the Secretary of State of Delaware, and a copy of the Bylaws of Seller, including all amendments thereto, certified as true, complete, correct and in full force and effect as of the Closing Date by the corporate Secretary of Seller;

(d) A Bill of Sale executed by Seller transferring all of the Acquired Assets to Purchaser (the "Bill of Sale"), a copy of which is attached hereto as Exhibit 3.02(d);

(e) A counterpart of the Assignment and Assumption Agreement with respect to the Assigned Contracts and the assigned Licenses and Permits by and between Purchaser and Seller (the "Assignment and Assumption Agreement") executed by Seller, a copy of which is attached hereto as Exhibit 3.02(e);

(f) A counterpart of the Intech Letter Agreement by and among Purchaser, Escient Technologies, LLC and INTECH Partners One, LLC (the "Intech Letter Agreement") executed by Escient Technologies, LLC, Scott A. Jones and INTECH Partners One, LLC, a copy of which is attached hereto as Exhibit 3.02(f);

(g) Counterparts to Employment Agreements executed by and between Purchaser and each of those key employees (the "Key Employees") identified by Purchaser on Schedule 3.02(g) attached hereto (the "Employment Agreements"), executed by each of the Key Employees;

(h) A counterpart of the Covenant Not to Compete by and between Purchaser and Scott A. Jones (the "Covenant Not to Compete") executed by Jones, a copy of which is attached hereto as Exhibit 3.02(h);

(i) Counterparts to the Non-Competition and Option Agreements (the "Non-Competition and Option Agreements") by and between D&M Holdings Inc. and each of those employees identified on Schedule 3.02(i) attached hereto (the "Non-Competition and Option Employees") executed by each of the Non-Competition and Option Employees;

(j) Documentation from National City Bank N.A. releasing its security interest in the Acquired Assets;

(k) A counterpart to the Consulting Agreement executed by and between Purchaser and Thomas Gabbert (the "Consulting Agreement"), executed by Thomas Gabbert, a copy of which is attached hereto as Exhibit 3.02(k);

(l) A counterpart to the Option Agreements (the "Option Agreements") by and between D&M Holdings Inc. and those employees identified on Schedule 3.02(l) (the "Option Employees") executed by each such employee;

(m) Copies of each of those consents, waivers, approvals, authorizations or orders required to be obtained by Seller prior to or simultaneously with the Closing for the assignment to and assumption by Purchaser of the Assigned Contracts (the "Consents to Assignment") executed by Seller and each of the Persons identified on Schedule 3.02(m) attached hereto;

(n) A counterpart to the Furniture and Systems Letter Agreement by and between Seller and Purchaser (the "Furniture, Equipment and Systems Letter Agreement") executed by Seller, a copy of which is attached hereto as Exhibit 3.02(n);

(o) A counterpart to the Escrow Agreement executed by Seller, OG and the Escrow Agent; and

(p) An assignment and transfer agreement between Escient Technologies, LLC and Seller documenting the transfer of the "Escient" trade name and design and all related domain names from Escient Technologies, LLC to Seller.

**Section 3.03. Deliveries by Purchaser.** In addition to the payment of the Asset Purchase Price, Purchaser is delivering (or is causing to be delivered) to Seller simultaneously with the execution of this Agreement, originals or copies, if specified, of the following agreements, documents, certificates, instruments and other items:

(a) Copies of the corporate resolutions adopted by the Board of Directors of Purchaser authorizing and approving the execution and delivery of this Agreement, the Related Agreements, and the other agreements and instruments contemplated hereby and thereby and the consummation of the transactions contemplated hereby and thereby,

certified to be true, complete, correct and in full force and effect as of the Closing Date by the corporate Secretary of Purchaser;

(b) A Certificate of Good Standing of Purchaser issued by the Secretary of State of Delaware, dated within ten (10) days of the Closing Date;

(c) A copy of the Certificate of Incorporation of Purchaser, including all amendments thereto, certified as true, complete and correct as of a date within ten (10) days of the Closing Date by the Secretary of State of Delaware, and a copy of the Bylaws of Purchaser, including all amendments thereto, certified as true, complete, correct and in full force and effect as of the Closing Date by the corporate Secretary of Purchaser;

(d) A counterpart of the Assignment and Assumption Agreement executed by Purchaser;

(e) A counterpart of the Intech Letter Agreement executed by Purchaser and INTECH Partners One, LLC;

(f) A counterpart of the Employment Agreements executed by Purchaser;

(g) A counterpart of the Covenant Not to Compete executed by Purchaser;

(h) Counterparts of the Non-Competition and Option Agreement executed by Purchaser;

(i) A counterpart to the Consulting Agreement executed by Purchaser;

(j) A counterpart to the Option Agreement executed by Purchaser;

(k) A counterpart to the Furniture and Systems Letter Agreement executed by Purchaser;

(l) A counterpart to the Escrow Agreement executed by Purchaser and the Escrow Agent; and

(m) A guaranty (the "Guaranty") of D&M Holdings, Inc. ("D&M") executed by D&M, a copy of which is attached hereto as Exhibit 3.03(m).

**Section 3.04. Payment of Asset Purchase Price.** Simultaneously with the execution and delivery of this Agreement, Purchaser shall pay the Asset Purchase Price as follows:

(a) eight hundred thousand United States dollars (\$800,000) to National City Bank N.A. by bank cashiers check or wire transfer of immediately available funds to an account designated by National City's written instructions to Purchaser prior to the Closing;

(b) five hundred thousand dollars (\$500,000) to Seller by bank cashiers check or wire transfer of immediately available funds to an account designated by Seller's written instructions to Purchaser prior to the Closing; and

(c) two hundred thousand United States dollars (\$200,000) (hereinafter referred to as the "Escrow Deposit") to National City Bank, N.A., as Escrow Agent (the "Escrow Agent") by bank cashiers check or wire transfer of immediately available funds to an account designated by the Escrow Agent's written instructions to Purchaser prior to the Closing, such Escrow Deposit to be held in escrow in accordance with the terms and conditions of the Escrow Agreement.

**Section 3.05. Possession of Acquired Assets.** Immediately following the Closing on the Closing Date, Seller shall take all actions which are required or reasonably requested by Purchaser to put Purchaser in full possession and control of all of the Acquired Assets.

#### **ARTICLE IV.** **REPRESENTATIONS AND WARRANTIES OF SELLER**

As a material inducement to Purchaser to enter into this Agreement and the Related Agreements and to consummate the transactions contemplated hereby and thereby, Seller represents and warrants to Purchaser as follows:

**Section 4.01. Organization; Power.** Seller is a corporation duly incorporated, validly existing and in good standing under the Laws of the State of Delaware. Seller is duly qualified and in good standing, if applicable, as a foreign corporation in each jurisdiction where the character of the property owned or leased by it or the nature of its activities makes such qualification necessary to carry on its business as now conducted. Seller has all requisite corporate power and authority to own, lease and operate the Acquired Assets and to carry on the Business as it is now conducted.

**Section 4.02. Authorization; Validity.** Seller has all requisite corporate power and authority to enter into, execute and deliver this Agreement and the Related Agreements, to consummate the transactions contemplated by this Agreement and the Related Agreements, and to comply with and fulfill the terms and conditions of this Agreement and the Related Agreements. The execution and delivery of this Agreement and the Related Agreements by Seller and the consummation by Seller of the transactions contemplated by this Agreement and the Related Agreements have been duly authorized by all necessary corporate action on the part of Seller and the shareholders of Seller, and no other corporate proceedings on the part of Seller or any shareholders of Seller are necessary to authorize the execution, delivery and performance of this Agreement and the Related Agreements. Seller has duly executed this Agreement and each of the Related Agreements to which it is a party and such agreements constitute legal, valid and binding obligations of Seller, enforceable against Seller in accordance with their respective terms and conditions, except as may be limited by applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar Laws relating to or affecting creditors' rights generally and general equitable principles.

**Section 4.03. No Conflict or Violation.** The execution, delivery and performance of this Agreement and the Related Agreements by Seller, and consummation of the transactions hereby, does not and will not, in any material respect (a) violate or conflict with any provision of the Certificate of Incorporation, Bylaws or other corporate governing documents of Seller; (b) violate or conflict with any provision of Law applicable to Seller or the Business; (c) violate or result in a breach of or constitute (with due notice or lapse of time or both) a default under any contract, lease, loan agreement, mortgage, security agreement, trust, indenture, license, consent order or other instrument or obligation to which Seller is a party, or by which Seller is bound or any of the Acquired Assets may be bound; or (d) result in the imposition of any Encumbrance (other than Permitted Encumbrances) on any of the Acquired Assets.

**Section 4.04. Consents and Approvals.** No governmental or other registration, filing, application, notice, transfer, consent, approval, order, qualification or waiver is required under any applicable Law to be obtained from or filed with any Governmental Entity or other Person by Seller by virtue of the execution, delivery and performance of this Agreement and the Related Agreements by Seller or the consummation by Seller of the transactions contemplated hereby except (a) as set forth on Schedule 4.04, or (b) such consents, approvals, and filings, the failure to obtain or make the same would not, individually or in the aggregate, have a Material Adverse Effect with respect to Seller, the Business or the Acquired Assets. Except as set forth in Schedule 4.16(c), all consents, waivers, approvals, authorizations or orders from any Governmental Entity or any other Person necessary for Seller to consummate the transactions contemplated by this Agreement and the Related Agreements have been obtained by Seller. Notwithstanding any of the foregoing, subject to the indemnification obligation of Seller set forth in Section 6.01(f), Seller and Purchaser have agreed that no attempt will be made by Seller or Purchaser to comply with the Indiana Uniform Commercial Code – Bulk Sales Act.

**Section 4.05. Financial Statements.** Attached hereto as Schedule 4.05 are true and complete copies of (a) the unaudited balance sheet of Seller as of December 31, 2002 and the related statements of operations, changes in shareholders' equity and cash flows for the year then ended, and (b) the unaudited balance sheet (the "February Balance Sheet") of Seller as of February 28, 2003 (the "February Balance Sheet Date"), and the related statements of operations, changes in shareholders' equity and cash flow for the period then ended. All financial statements referred to in this Section 4.05 (the "Financial Statements") have been prepared in accordance with GAAP on a consistent basis and fairly present the financial position of Seller as of the respective dates thereof and the results of Seller's operations, cash flows and changes in shareholders' equity for the periods then ended.

**Section 4.06. Absence of Certain Changes or Events.** Except as set forth on Schedule 4.06, since the February Balance Sheet Date, Seller has operated the Business in the Ordinary Course of Business and there has not been any:

(a) sale, assignment or transfer of any material assets or properties of Seller, except in the Ordinary Course of Business;

(b) incurrence of any indebtedness for borrowed money except to National City Bank N.A. in an aggregate amount not to exceed \$3,000,000;

(c) creation, assumption or other incurrence of any Encumbrance on any of the Acquired Assets (except for the Permitted Encumbrances);

(d) execution and delivery, waiver, amendment, cancellation or termination of any contract, license or other instrument material to the Business, or any relinquishment of any rights thereunder;

(e) failure to pay, discharge or satisfy when due any liabilities of Seller with regard to the Acquired Assets;

(f) material capital expenditure in connection with the Business;

(g) material change in accounting methods or practices of Seller;

(h) material damage, destruction or loss (whether or not covered by insurance) affecting the Acquired Assets or the Business;

(i) material increase in any compensation paid or payable to employees of Seller or material change in any employee benefits provided to employees of Seller; or

(j) other event or condition of any character (whether or not covered by insurance) which has had a Material Adverse Effect with respect to Seller, the Business or the Acquired Assets.

**Section 4.07. Tax Matters.** Except as set forth on Schedule 4.07, Seller has accurately, duly and timely filed all Tax Returns required to have been filed with any federal, state, local or foreign Taxing authority on or before the Closing Date, and has timely paid all Taxes due and payable by Seller on or before the Closing Date, whether or not shown on such Tax Returns. Seller has set up reserves or accruals on the February Balance Sheet which are adequate to reflect the accrual of all Taxes for all periods through the Closing Date. Except as set forth on Schedule 4.07, no Taxing authority has asserted or, to the Knowledge of Seller, threatened any claim against Seller for the assessment of any additional Tax liability or initiated any action or proceeding which could result in such an assertion or proposed any material adjustments relating to the Tax Returns. Except as set forth on Schedule 4.07, Seller has made all withholdings and payments of Taxes required to be made by it under all applicable Laws and regulations, including withholdings and payments with respect to sales and use Taxes and withholdings or payments with respect to amounts paid or owing to any employee, independent contractor, creditor, stockholder or other third party. Seller is not a "foreign person" within the meaning of Section 1445(f)(3) of the Code. The transactions contemplated by this Agreement are not subject to the Tax withholding provisions of Section 3406 of the Code or of Sub-Chapter A or Chapter 3 of the Code, or of any other comparable provision of Law. Seller has not entered into any transfer pricing agreement or other like arrangements with respect to any foreign jurisdiction. Nothing in this Section 4.07 shall be construed to imply that Purchaser will assume any Tax Liability arising through the Closing Date.

**Section 4.08. Absence of Liabilities.** Seller has no material liabilities or obligations other than (a) those liabilities and obligations reflected on the February Balance Sheet, (b) those liabilities and obligations incurred in the Ordinary Course of Business since the February

Balance Sheet Date, (c) liabilities under contracts, licenses and leases to which Seller is a party, and (d) those liabilities and obligations set forth on Schedule 4.08.

**Section 4.09. Equipment and Machinery.** Each material item of Equipment and Machinery is in good operating condition and repair (ordinary wear and tear excepted) and is sufficient for the operation of the Business as presently conducted.

**Section 4.10. Inventories.** All items of Inventory included in the Acquired Assets consist of a quality and quantity usable and saleable in the Ordinary Course of Business. All Inventory (other than Inventory in transit in the Ordinary Course of Business) is located at the primary office of the Business located in Indianapolis, Indiana.

**Section 4.11. Intellectual Property.**

(a) Schedule 4.11(a) contains a complete and accurate list of all registrations, issuances or applications relating to any Business IP that is owned by Seller, including without limitation, any domain name, patent, registered trademark or registered copyright ("Registered IP") and, all Claims pending before any court or tribunal (including the United States Patent and Trademark Office (the "PTO") or equivalent authority anywhere in the world) related to or involving any Business IP that is owned by Seller.

(b) Except as set forth on Schedule 4.11(b), there are no pending or, to the Knowledge of Seller, threatened Actions, or outstanding decrees, orders or judgments that question, challenge, encumber, impair, terminate, nullify or restrict in any manner the use, transfer, ownership, validity, enforceability or licensing of any of the Business IP that is owned by Seller. Except as set forth on Schedule 4.11(b), (i) all Business IP owned by Seller and all IP Licenses are assignable to Purchaser in accordance with the transactions contemplated by this Agreement without the consent or approval of any Person and (ii) the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby will not impair, limit, terminate or nullify, or cause any Encumbrance on, any rights relating to the Business IP or the IP Licenses, or cause any payments to be due with respect thereto, except for the royalties and payments due and payable thereunder in the Ordinary Course of Business of Seller.

(c) Except as set forth on Schedule 4.11(c), each item of Registered IP is registered and all necessary registration, maintenance and renewal fees currently due in connection with the registration of such Registered IP have been made and all necessary documents, recordations and certificates in connection with such Registered IP have been filed with the relevant patent, copyright, trademark or other authorities in the United States or foreign jurisdictions, as the case may be, for the purposes of maintaining such registrations through sixty (60) days after the Closing Date. Except as set forth on Schedule 4.11(c), there are no actions that must be taken within the sixty (60) day period following the Closing Date, including, without limitation, the payment of any registration, maintenance or renewal fees or the filing of any documents, applications or certificates for the purposes of maintaining or renewing any Registered IP. Except as set forth on Schedule 4.11(c), Seller has not acquired from any Person any Business IP that is material to the Business. Seller has taken all commercially reasonable and appropriate

measures to protect, police, register and maintain all material Business IP owned by Seller.

(d) Except as set forth on Schedule 4.11(d), (i) Seller owns and has good title to, or has a valid and transferable license to, each item of Business IP which is material to the Business, free and clear of all Encumbrances (excluding Encumbrances incurred in connection with the IP Licenses) and all adverse ownership claims of current and former employees and contractors of Seller and (ii) all of the material Business IP is currently subsisting and, to the Knowledge of Seller, is valid and enforceable.

(e) Schedule 4.11(e) contains a true, complete and accurate list of all contracts, licenses and agreements to which Seller is a party (i) with respect to any Business IP which was licensed or transferred by Seller to any third party; (ii) pursuant to which a third party has licensed or transferred any Business IP to Seller (other than shrink-wrap licenses and other agreements for the use of currently available off-the-shelf software); or (iii) that otherwise relate to the use or ownership of any of the Business IP (collectively, the "IP Licenses").

(f) Except as set forth on Schedule 4.11(f), to the Knowledge of Seller, neither the conduct of the Business, the use or license of any Business IP, nor the development, manufacture, marketing, license, sale nor use of any product, technology or service currently developed, manufactured, marketed, licensed, used or sold by Seller Infringes upon any Intellectual Property of any third party and, to the Knowledge of Seller, none of the Business IP is being infringed by any third party.

(g) Except as disclosed on Schedule 4.11(g), Seller has taken all commercially reasonable measures (including complying in all material respects with all applicable Laws) (i) to ensure the security, accuracy, integrity and enforceability of all transactions executed through its systems, Internet sites, software, databases and networks, in each case, as used in the day to day operations of the Business ("Systems") and (ii) to protect all information contained on its Systems from any unauthorized, illegal or improper use, access, interruption or modification.

**Section 4.12. Labor Relations.** Except as set forth in Schedule 4.12, (a) Seller is not a party to any collective bargaining agreement or other contract or agreement with any labor organization or other representative of any employees of Seller or Persons providing services to Seller, nor is any such contract or agreement presently being negotiated; (b) Seller is not a party to any employment agreement or consulting agreement with any Person, nor is any such contract or agreement presently being negotiated; (c) there is no unfair labor practice charge or complaint pending or, to the knowledge of Seller, threatened against or otherwise affecting Seller; (d) there is no labor strike, slowdown, work stoppage, dispute, lockout or other labor controversy in effect or, to the knowledge of Seller, threatened against or otherwise affecting Seller, and Seller has not experienced any such labor controversy within the past five years; (e) no representation question exists or has been raised respecting any of the employees of Seller within the past five years, nor to the knowledge of Seller are there any campaigns being conducted to solicit cards from employees to authorize representation by any labor organization; (f) no action, suit, complaint, charge, arbitration, inquiry, proceeding or investigation by or before any court, governmental

agency, administrative agency or commission brought by or on behalf of any employee, prospective employee, former employee, retiree, labor organization or other representative of the employees of Seller is pending or, to the knowledge of Seller, threatened against Seller; (g) no grievance is pending or, to the knowledge of Seller, threatened, which, if adversely decided, could have a Material Adverse Effect on Seller; (h) Seller is not a party to, or otherwise bound by, any consent decree with, or citation by, any Governmental Entity relating to employees or employment practices; (i) Seller is in compliance in all material respects with all applicable Laws, agreements, contracts, and policies relating to employment, employment practices, wages, hours, terms and conditions of employment; (j) except for accrued vacation liabilities, which shall be assumed in full by Purchaser, Seller has paid in full to all employees all wages, salaries, commissions, bonuses, benefits and other compensation due to such employees or otherwise arising under any policy, practice, agreement, plan, or program of Seller or any applicable Law; (k) Seller is not liable for any severance pay or other payments to any employee or former employee arising from the termination of employment, nor will Seller have any liability under any benefit or severance policy, practice, agreement, plan, or program which exists or arises, or may be deemed to exist or arise, under any applicable Law or otherwise, as a result of or in connection with the transactions contemplated hereunder or as a result of the termination of any Persons employed by Seller on or prior to the Closing Date; (l) each individual who is treated by Seller as an independent contractor is properly so treated under applicable Law; (m) Seller has not closed any plant or facility, effectuated any layoffs of employees or implemented any early retirement, separation or window program within the past five years, nor has Seller planned or announced any such action or program for the future; (n) Seller is in compliance with its obligations pursuant to the Worker Adjustment and Retraining Notification Act of 1988, and all other notification and bargaining obligations arising under any collective bargaining agreement, Law or otherwise.

#### **Section 4.13. Employee Benefits.**

(a) Schedule 4.13 contains a list of each "employee pension benefit plan" (as defined in Section 3(2) of the Employee Retirement Income Security Act of 1974 and the regulations adopted pursuant thereto ("ERISA")), "employee welfare benefit plan" (as defined in Section 3(1) of ERISA), vacation, pension, stock option, stock purchase, deferred compensation, severance, and other fringe benefit plan, policy, agreement, program or arrangement maintained, contributed to, or required to be maintained or contributed to by Seller in which any present or former employee or their dependents participate (together with any employment or change in control agreements, programs or policies, collectively referred to hereinafter as the "Benefit Plans"). Seller has delivered or made available to Purchaser true, complete and correct copies of (i) each Benefit Plan (or, in the case of any unwritten Benefit Plans, descriptions thereof) and (ii) the most recent summary plan description for each Benefit Plan (if any such description was required).

(b) Seller has no, and in the five calendar years prior to 2003 has not had any, obligation to contribute to (or any other liability, including current or potential withdrawal liability, with respect to) and has never contributed to any "multiemployer plan" (as defined in Section 3(37) and Section 4001(a)(3) of ERISA).

(c) Seller does not maintain nor has it any obligation to contribute to (or any other liability with respect to) any plan or arrangement whether or not terminated, which provides medical, health, life insurance or other welfare-type benefits for current or future retired or terminated employees (except for limited continued medical benefit coverage required to be provided under Section 4980B of the Code or as required under applicable state Law).

(d) Seller does not maintain nor contribute to or have any liability under (or with respect to) any employee plan which is a tax-qualified "defined benefit plan" (as defined in Section 3(35) of ERISA), whether or not terminated.

(e) (i) Each Benefit Plan has been established and administered in material compliance with its terms and the applicable provisions of ERISA, the Code and other applicable Laws; (ii) each Benefit Plan that is intended to be qualified under Section 401(a) of the Code has received a favorable determination letter from the Internal Revenue Service to the effect that such Benefit Plan is qualified under the Code and nothing has occurred that could reasonably be expected to cause the loss of such qualification; and (iii) no event has occurred and no condition exists that would subject the Seller or its Affiliates, either directly or by reason of their affiliation with any member of their "Controlled Group" (defined as any organization which is a member of a controlled group of organizations within the meaning of Code Sections 414(b), (c), (m) or (o)), to any tax, fine, lien, penalty or other liability imposed by ERISA, the Code or other applicable laws, rules and regulations.

(f) Except as set forth in Schedule 4.13, no Benefit Plan exists that could result in the payment to any Former Seller Employee of any money or other property (including any severance payments, bonus or other compensation) or in the acceleration of any other rights or benefits to any Former Seller Employee as a result of the transactions contemplated herein.

**Section 4.14. Licenses and Permits.** Schedule 4.14 sets forth a list, together with a brief description of type, duration and status, of each material License and Permit issued to Seller. Seller has made true and complete copies of all Licenses and Permits available to Purchaser. Seller is in compliance in all material respects with all terms, conditions and requirements of all Licenses and Permits and no proceeding is pending or, to the Knowledge of Seller, threatened relating to the revocation or termination of any of the Licenses or Permits. Seller has all material Licenses and Permits necessary to conduct its Business as now conducted.

**Section 4.15. Insurance.**

(a) Schedule 4.15 sets forth a list of all policies of title, liability, fire, casualty, business interruption, workers' compensation and all other forms of insurance (collectively, "Policies" and each individually, a "Policy") which have insured the Acquired Assets and Business in the twelve (12) month period prior to the Closing Date, specifying the carrier, policy number, expiration dates, premiums, description of type of coverage and coverage amounts for each Policy. Seller has made true and complete copies of all Policies available to Purchaser.

(b) Each of the Policies is in an amount usually and customarily carried, and insures against those risks usually and customarily covered, by a Person engaged in the type of business which constitutes the Business. The Policies currently in effect are in full force and effect and are valid, outstanding and enforceable, and all premiums due thereon have been paid. Seller is not in default under any provisions of any Policy. There is no claim by Seller pending under any Policy as to which coverage has been questioned, denied or disputed by the underwriters of any Policy, and Seller has no Knowledge of any basis for denial of any claim under any Policy. The Policies were sufficient in all respects for compliance by Seller with all requirements of Law and with the requirements of all Assigned Contracts and Permits and Licenses.

**Section 4.16. Contracts and Commitments.**

(a) Schedule 4.16(a) lists all material contracts to which Seller is a party, including but not limited to the following (collectively, the "Material Contracts"):

(i) employment, consulting, bonus, profit-sharing, percentage compensation, deferred compensation, pension, welfare, retirement, stock purchase or stock option plans and agreements and commitments with employees and Affiliates of Seller;

(ii) notes, mortgages, contracts, agreements, and commitments for the repayment or borrowing of money by Seller, or for a line of credit including borrowings by Seller in the form of guarantees of, indemnification for, or agreements to acquire any obligations of others, and all security or pledge agreements related thereto;

(iii) contracts, agreements and commitments, other than the Assigned Contracts, relating to the purchase or sale of any goods or services by Seller, unless all amounts that may become due and payable, and all performance obligations that may arise, under such contract were paid in full and fully performed, as the case may be, prior to the Closing Date;

(iv) all material IP Licenses;

(v) contracts, agreements, and commitments relating to any joint venture, partnership, strategic alliance, or sharing of profits or losses with any Person to which Seller is a party or by which it or any of the Acquired Assets is bound;

(vi) contracts, agreements, and commitments containing covenants purporting to limit the freedom of Seller to compete in any business or in any geographic area; and

(vii) contracts, agreements, and commitments requiring payments or distributions by Seller to any shareholder, director, or employee of Seller, or any relative or Affiliate of any such Person.

(b) All of the Assigned Contracts are in full force and effect. Except as set forth on Schedule 4.16(b), to the Knowledge of Seller, (i) each Assigned Contract is the legal, valid and binding obligation of each party thereto enforceable against such party thereto in accordance with its terms, except to the extent that unenforceability would not materially adversely affect Seller's rights thereunder or as may be limited by applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar Laws relating to or affecting creditors' rights generally and general equitable principles and (ii) no other party thereto is in material default or has failed to perform any material obligation thereunder. Complete and correct copies of each Assigned Contract have been delivered or made available to Purchaser. There is no default of or failure to perform by Seller under any Contract that could reasonably be expected to have a Material Adverse Effect with respect to Seller, the Business or the Acquired Assets.

(c) Except as set forth in Schedule 4.16(c), all of the Consents to Assignment have been obtained by Seller and provided to Purchaser.

**Section 4.17. Customers and Suppliers.** Schedule 4.17 sets forth a list of (a) Seller's ten (10) largest customers by dollar volume (with specification of the dollar volume) for the period January 1, 2002 to December 31, 2002 and (b) Seller's ten (10) largest suppliers by dollar volume (with specification of the dollar volume) for the period January 1, 2002 to December 31, 2002.

**Section 4.18. Compliance with Law.** Except as set forth on Schedule 4.18, Seller is in compliance in all material respects with all Laws applicable to Seller, the Acquired Assets and the Business, including those applicable to discrimination in employment, occupational safety and health, trade practices, competition and pricing, product warranties, zoning, building, sanitation, employment, retirement, labor relations, product advertising and any applicable Environmental Requirements, except where noncompliance could not reasonably be expected to have a Material Adverse Effect with respect to Seller, the Business or the Acquired Assets. Seller is not in default or violation with respect to any order, writ, judgment, award, injunction or decree of any Governmental Entity or arbitrator applicable to Seller, the Acquired Assets or the Business. To the Knowledge of Seller, there are no existing orders, judgments or decrees of any Governmental Entity adversely affecting the Business or any Acquired Asset.

**Section 4.19. Litigation.** Except as set forth on Schedule 4.19, (a) there are no material claims, actions, suits, proceedings, arbitral actions, or investigations ("Actions") pending or, to the Knowledge of Seller, threatened against Seller or involving any of the Acquired Assets that seek (i) to obtain monetary damages, (ii) to restrain, enjoin or limit the use or exploitation of any Acquired Asset or otherwise limit the conduct of the Business or (iii) to enjoin or rescind the transactions contemplated by this Agreement or otherwise seek to prevent Seller from complying with the terms and provisions of this Agreement and (b) there are no unsatisfied judgments of any kind against Seller or any of the Acquired Assets.

**Section 4.20. Title to the Acquired Assets and Related Matters.** Except as set forth on Schedule 4.20, Seller has good and marketable title to all of the Acquired Assets, free and clear of all Encumbrances (other than the Permitted Encumbrances), and has the complete

and unrestricted power and the unqualified right to sell, convey, assign, transfer and deliver the Acquired Assets to Purchaser.

**Section 4.21. Real Property.** Seller does not own and has never owned any real property. Schedule 4.21 sets forth a complete list of all real property in which Seller has a leasehold interest which is held or used in connection with the Business (the "Leased Real Property"). Except as set forth on Schedule 4.21, none of the Leased Real Property is subject to any sublease or grant to any Person of any right to the use, occupancy, or enjoyment of the property or any portion thereof.

**Section 4.22. No Other Agreements.** Seller does not have any obligation, absolute or contingent, to any other Person to sell, assign or transfer any of the Acquired Assets, or to effect any merger, consolidation or other reorganization involving Seller, or to enter into any agreement with respect to any of the foregoing.

**Section 4.23. Broker's and Finder's Fees.** Except for those Persons set forth on Schedule 4.23 (the fees and commissions of which shall be paid in full by Seller), no broker, finder or other Person is entitled to any commission or finder's fee in connection with this Agreement or any of the Related Agreements or the transactions contemplated hereby or thereby as a result of any actions or commitments of Seller (or any of its Affiliates).

**Section 4.24. Disclosure.** This Agreement and the schedules delivered pursuant hereto do not as of the Closing Date contain any untrue statement of a material fact or omit any information or statement of a material fact necessary in order to make the information or statements herein or therein not misleading in light of the circumstances in which they were made by Seller.

**Section 4.25. Capitalization.** As of the Closing Date, the capitalization of Seller is as set forth on Schedule 4.25. All outstanding equity securities of Seller have been duly authorized and validly issued and are fully paid and nonassessable.

**Section 4.26. Product Warranties.** Schedule 4.26 includes copies of the standard terms and conditions of sale for each product manufactured or sold or service provided in the conduct or operation of the Business (containing applicable guaranty, warranty and indemnity provisions). The products sold in the conduct or operation of the Business have been sold in accordance with the standard terms and conditions of sale. All product warranty claims included in the Assumed Liabilities are governed exclusively by the terms of the warranty provisions in the standard terms and conditions of sale.

**Section 4.27. General.**

(a) Except as otherwise indicated therein, the representations and warranties contained in the foregoing Sections 4.01 through 4.26 of this Agreement, inclusive, are made as of the date of this Agreement.

(b) Notwithstanding any other provision of this Agreement or otherwise, Seller shall not be deemed to have made any representation or warranty other than those expressly made in Sections 4.01 through 4.26, inclusive. Without limiting the generality

of the foregoing, and notwithstanding any otherwise express representation or warranty made by Seller in Sections 4.01 through 4.26, inclusive, Seller makes no representation and warranty with respect to:

(i) any oral or written projections, estimates, budgets or statements heretofore delivered to or made available to Purchaser of future revenues, expenses or expenditures, results of operations, profitability, cash flows, budgets, prospects, financial condition, market conditions or new developments with respect to the Acquired Assets or the Business; or

(ii) any other oral or written information or documents of any kind made available to Purchaser or any of its representatives with respect to Seller, except as expressly covered by a representation or warranty contained in Sections 4.01 through 4.26, inclusive.

#### **ARTICLE V.** **REPRESENTATIONS AND WARRANTIES OF PURCHASER**

As a material inducement to Seller to enter into this Agreement and the Related Agreements and to consummate the transactions contemplated hereby and thereby, Purchaser represents and warrants to Purchaser as follows:

**Section 5.01. Organization; Power.** Purchaser is a corporation duly incorporated, validly existing, and in good standing under the Laws of the State of Delaware and has all requisite corporate power and authority to own its properties and assets and to conduct its business as now conducted.

**Section 5.02. Authorization; Validity.** Purchaser has all requisite corporate power and authority to enter into this Agreement and the Related Agreements and to perform its obligations hereunder and thereunder. The execution and delivery of this Agreement and the Related Agreements and the performance of the obligations of Purchaser hereunder and thereunder have been duly authorized by all necessary corporate action by Purchaser and no other corporate proceedings on the part of Purchaser are necessary to authorize the execution, delivery or performance of this Agreement and the Related Agreements. Purchaser has duly executed this Agreement and each of the Related Agreements to which it is a party and such agreements constitute, upon due execution thereof, the valid and binding obligations of Purchaser, enforceable against Purchaser in accordance with their respective terms and conditions, except as may be limited by applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar Laws relating to or affecting creditors' rights generally and general equitable principles.

**Section 5.03. No Conflict or Violation.** Purchaser's execution, delivery and performance of this Agreement and the Related Agreements do not and shall not, in any material respect: (a) violate or conflict with any provision of the Certificate of Incorporation, Bylaws or other corporate governing documents of Purchaser; (b) violate any provision of Law applicable to Purchaser; or (c) violate or result in a breach of or constitute (with due notice or lapse of time or both) a default under any contract, lease, loan agreement, mortgage, security agreement, trust,

indenture, license, consent order or other agreement or instrument to which Purchaser is a party, or by which Purchaser is bound or to which any of Purchaser's material properties or assets is subject.

**Section 5.04. Consents and Approvals.** Purchaser's execution, delivery and performance of this Agreement and the Related Agreements do not require Purchaser to obtain the consent or approval of, or to make any filing with, any Governmental Entity or other Person except such consents, approvals, and filings, the failure to obtain or make which would not, individually or in the aggregate, have a Material Adverse Effect with respect to Purchaser.

**Section 5.05. Litigation.** There are no actions, material claims, suits or proceedings pending or, to the knowledge of Purchaser, threatened against Purchaser in connection with or relating to the transactions contemplated by this Agreement or any Related Agreement.

**Section 5.06. Broker's and Finder's Fees.** Other than USBX Advisory Services and Ripplewood Denon Acquisition, L.P. and their respective Affiliates (the fees and commissions of which shall be paid in full by Purchaser), no broker, finder or other Person is entitled to any commission or finder's fee in connection with this Agreement and the Related Agreements or the transactions contemplated by this Agreement and the Related Agreements as a result of any actions or commitments of Purchaser or any of its Affiliates.

## **ARTICLE VI.** **OTHER AGREEMENTS**

**Section 6.01. Files and Records.** Purchaser shall retain possession of all Files and Records transferred to Purchaser hereunder and files and records coming into existence after the Closing Date which relate to the Business before the Closing Date (including, without limitation, personnel files and information related to any Former Seller Employees), for a period of seven (7) years following the Closing Date. In addition, from and after the Closing Date, upon reasonable notice and during normal business hours, Purchaser shall provide access to Seller and its attorneys, accountants and other representatives, at Seller's expense, to such files and records as Seller may reasonably deem necessary to properly prepare for, file, prove, answer, prosecute, and/or defend any Tax return, filing, audit, protest, claim, suit, inquiry or other proceeding.

**Section 6.02. Employees.** Effective immediately prior to the Closing, Seller has terminated the employment of all of its employees, a list of whom is set forth on Schedule 6.02 ("Former Seller Employees"). Purchaser shall offer to hire all Former Seller Employees immediately following the Closing on terms and conditions of employment not materially less favorable than those provided by Seller immediately prior to the Closing (other than with respect to any equity or equity-based compensation) and otherwise as determined by Purchaser in its sole discretion. All Former Seller Employees who accept Purchaser's offer of employment and commence working with Purchaser ("New Purchaser Employees") will be credited with his or her years of service with Seller solely for purposes of eligibility to participate in, and vesting under (but not for purposes of benefit accrual requirements under), any of the employee benefit programs maintained by Purchaser or any of its Affiliates for their employees. Purchaser shall be solely responsible for severance costs and expenses, if any, attributable to any Former Seller Employee (i) who is not offered employment by Purchaser, (ii) who does not accept Purchaser's

offer of employment or (iii) who leaves the employment of, or is terminated by, Purchaser after the Closing.

**Section 6.03. COBRA Obligations.** The parties hereto acknowledge and understand that Seller will cease to maintain a group health plan following the Closing and will cease providing, and will not provide, continuing health benefit coverage as described in Sections 601 through 608 of ERISA and Code Section 4980B (hereinafter referred to as "COBRA Coverage") to any of those persons who are "M&A qualified beneficiaries" (as described in Internal Revenue Service Regulation Section 54.4980B-9, Question and Answer 4) (hereinafter referred to as "COBRA Beneficiaries"), which COBRA Beneficiaries are listed on Schedule 6.03 hereto. The parties hereto agree that all obligations to provide COBRA Coverage to COBRA Beneficiaries are being allocated to Purchaser, consistent with the provisions of Internal Revenue Service Regulation Section 54.4980B-9, Question and Answer 7, and Purchaser shall be solely responsible for providing such coverage to such COBRA Beneficiaries. Notwithstanding any of the foregoing to the contrary, under no circumstances shall Purchaser assume any liability of Seller with respect to any failure of Seller to comply with COBRA prior to the Closing or any liability arising or existing under COBRA as it relates to present or former employees of Seller who do not meet the definition of COBRA Beneficiaries as set forth above.

**Section 6.04. Employee Benefits.**

(a) Effective as of the Closing Date, New Purchaser Employees who are participants in the Escient Profit-Sharing Plan ("Seller's 401(k) Plan") shall cease making contributions to Seller's 401(k) Plan and, to the extent permitted by Seller's 401(k) Plan, shall become vested in their account balances as of the Closing Date. To the extent permitted under the terms of Seller's 401(k) Plan and consistent with the provisions of Section 401(k)(2)(B)(i) of the Code, Seller shall cause the trustee of the trust under Seller's 401(k) Plan to permit eligible rollover distributions within the meaning of Section 402(c) of the Code from Seller's 401(k) Plan to New Purchaser Employees. Effective as of the Closing Date, Purchaser shall designate a 401(k) Plan of the Purchaser or an Affiliate thereof ("Purchaser's 401(k) Plan") in which New Purchaser Employees shall be eligible to participate in accordance with its terms and subject to the requirements of Section 6.02 hereof. Purchaser's 401(k) Plan will accept eligible rollover distributions within the meaning of Section 402(c) of the Code from Seller's 401(k) Plan.

(b) Subject to Section 6.03 of this Agreement (which sets forth the assumption of COBRA obligations by Purchaser) and this Section 6.04, Purchaser shall not assume any Benefit Plan of Seller. Effective as of the Closing Date, New Purchaser Employees shall be eligible to immediately participate in such employee benefit plans of the Purchaser or an Affiliate thereof as Purchaser shall designate in accordance with the requirements of Section 6.02 hereof and otherwise in accordance with the terms and conditions on which similarly situated employees of Purchaser (or an Affiliate thereof, as the case may be) participate therein as of the Closing Date. As of the Closing Date, Purchaser shall (i) cause any pre-existing conditions to be waived under any employee benefit plans offered by Purchaser for New Purchaser Employees currently participating in like plans of Seller, (ii) grant credit for year-to-date out of pocket costs (deductibles, co-payments, etc.) incurred by such New Purchaser Employees under any Benefit Plan of

Seller that is reasonably comparable to that maintained by Purchaser (or an Affiliate thereof, as the case may be), and (iii) to the extent permitted under applicable law, ensure that all participant contributions credited towards any flexible spending accounts of a New Purchaser Employee under Seller's Code Section 125 plan as of the Closing Date will be credited to each such New Purchaser Employee's account under Purchaser's Code Section 125 plan.

(c) Set forth on Schedule 6.04 hereof is the number of vacation days accrued, used, and not used under Seller's vacation policy as of the Closing Date. As of the Closing Date, Purchaser shall credit each New Purchaser Employee with his or her number of accrued but unused vacation days, but only to the maximum extent permitted by Purchaser's vacation policy currently in effect for similarly situated employees of Purchaser (a copy of which has previously been provided to Seller), giving recognition to such number of vacation days that each such New Purchaser Employee has already taken during 2003. Notwithstanding the foregoing, regardless of Purchaser's vacation policy, (i) Purchaser is assuming all of Seller's liabilities and obligations to Former Seller Employees and New Purchaser Employees for accrued vacation as set forth on Schedule 6.04 hereof and nothing in this Section 6.04 shall be construed otherwise and (ii) to the extent that any New Purchaser Employee has accrued but unused vacation days under Seller's vacation policy in excess of those vacation days permitted by Purchaser's vacation policy, Purchaser shall pay to such New Purchaser Employee the cash equivalent of any such excess number of vacation days after the Closing.

(d) To the extent permitted under applicable Law, Seller shall provide Purchaser with all records and information necessary or appropriate to carry out Purchaser's obligations under this Section 6.04.

**Section 6.05. Use of Systems.** The parties hereto acknowledge that certain of Seller's Affiliates are currently using email accounts through www.escient.com and agree that such Affiliates may continue their use of those accounts until they can be replaced with other accounts; provided that such use shall in no event continue for more than ninety (90) days following the Closing.

## **ARTICLE VII.** **INDEMNIFICATION**

**Section 7.01. Indemnification by Seller.** From and after the Closing Date and subject to the provisions of Section 7.04, Seller shall indemnify, defend and hold harmless Purchaser and its successors and permitted assigns (and each of their respective shareholders, employees, officers, directors, representatives, Affiliates and agents), without duplication, from and against any and all damages, losses, obligations, liabilities, claims, penalties, costs and expenses, including reasonable attorneys' fees (and costs and reasonable attorneys' fees in respect of any suit to enforce this provision) (each a "Claim"), arising from or relating to:

(a) any material misrepresentation in or material breach of or material failure to perform any representation or warranty of Seller contained in this Agreement or any Related Agreement to which Seller is a party;

(b) any material misrepresentation in or material breach of or material failure to perform any covenant, agreement or other obligation of Seller contained in this Agreement or any Related Agreement to which Seller is a party;

(c) any Liability of Seller relating to the Acquired Assets or the Business to the extent arising out of transactions entered into or events occurring prior to the Closing Date (other than any Assumed Liabilities);

(d) any Liability whether presently in existence or arising hereafter that is attributable to an Excluded Asset;

(e) any accounts payable or accrued and unpaid expenses, including but not limited to direct out-of-pocket third party commissions, duplication costs and other distribution expenses that are due and payable by their own terms on or before the Closing Date (other than any Assumed Liabilities);

(f) any loss, claim, expense, damage or liability (including reasonable attorneys' fees and expenses) to which Purchaser and/or the Acquired Assets may become subject insofar as such loss, claim, damage or liability (or actions in respect thereof) arises out of or is based upon a breach or alleged breach of, or failure to comply with any provision of, or failure to give any notice or make any filing pursuant to, any bulk sales Law or similar Law of any state or other jurisdiction, whether or not Seller or Purchaser attempt to comply with such bulk sales Law (provided, that nothing in this Section 7.01(f) shall estop or prevent Seller or Purchaser from asserting as a bar or defense to any action or proceeding brought under any state bulk sales Law that such Law is not applicable to the transactions contemplated by this Agreement); and

(g) any and all actions, suits, investigations, proceedings, demands, assessments, audits and judgments arising out of any of the foregoing.

**Section 7.02. Indemnification by Purchaser.** From and after the Closing Date and subject to the provisions of Section 7.04, Purchaser shall indemnify, defend and hold harmless Seller and its successors and permitted assigns (and each of their respective shareholders, officers, directors, representatives, Affiliates and agents), without duplication, from and against any and all Claims resulting from or relating to:

(a) any material misrepresentation in or material breach of or material failure to perform any representation or warranty of Purchaser contained in this Agreement or any Related Agreement to which Purchaser is a party;

(b) any material misrepresentation in or material breach of or material failure to perform any covenant, agreement or other obligation of Purchaser contained in this Agreement or any Related Agreement to which Purchaser is a party;

(c) any Liability of Purchaser relating to the Acquired Assets or Business to the extent arising out of transactions entered into or events occurring on or after the Closing Date;

- (d) the Assumed Liabilities (or any one of them); and
- (e) any and all suits, actions, investigations, proceedings, demands, assessments, audits and judgments arising out of any of the foregoing.

**Section 7.03. Procedure for Making Indemnification Claims.**

(a) General. Promptly after acquiring knowledge of any Claim for which one of the parties hereto (the "Indemnified Party") may seek indemnification against another party (the "Indemnifying Party") pursuant to this Article VII, the Indemnified Party shall give written notice thereof to the Indemnifying Party. Failure to provide prompt written notice shall not relieve the Indemnifying Party of its obligations under this Article VII except to the extent that the Indemnifying Party is materially damaged by such failure.

(b) Third Party Claims.

(i) Any Indemnified Party seeking indemnification pursuant to this Article VII in respect of any Claim instituted by any third Person shall give the Indemnifying Party (A) prompt written notice (but in no event more than twenty (20) days after the Indemnified Party acquires knowledge thereof) of such Claim and (B) copies of all documents and information relating to any such Claim within twenty (20) days of their being obtained by the Indemnified Party; provided, that the failure by the Indemnified Party to so notify or provide copies to the Indemnifying Party shall not relieve the Indemnifying Party from any liability to the Indemnified Party for any liability hereunder except to the extent that such failure shall have actually prejudiced the defense of the Claim.

(ii) Subject to Section 7.03(b)(iii) below, the Indemnifying Party shall have the right, at its option and expense, to defend against, negotiate, settle or otherwise deal with any Claim with respect to which it is the Indemnifying Party and to be represented by counsel of its own choice, and the Indemnified Party will not admit any liability with respect thereto or settle, compromise, pay or discharge the same without the consent of the Indemnifying Party, so long as the Indemnifying Party is contesting or defending the same with reasonable diligence and in good faith. The Indemnified Party may participate in any proceeding with counsel of its choice and at its expense. The Indemnifying Party may not enter into a settlement of any such Claim without the consent of the Indemnified Party, which consent shall be not unreasonably withheld, unless such settlement requires no more than a monetary payment for which the Indemnified Party is fully indemnified by the Indemnifying Party or involves other matters not binding upon the Indemnified Party.

(iii) In the event the Indemnifying Party does not, within twenty (20) days after it receives written notice of the Claim from the Indemnified Party, agree in writing to accept the defense of, and assume all responsibility for (subject to the terms of this Article VII), such Claim as provided in this Article VII, then the Indemnified Party shall have the right to defend against, negotiate, settle or

otherwise deal with the Claim in such manner as the Indemnified Party deems appropriate, in its sole discretion, and the Indemnified Party shall be entitled to indemnification therefor from the Indemnifying Party in accordance with the terms and conditions of this Article VII.

**Section 7.04. Survival; Escrow; Payment of Claims; Deductibles; Exclusive Remedy.**

(a) Survival. Notwithstanding any term or provision of this Agreement to the contrary, each of the parties' representations and warranties contained in this Agreement and the Related Agreements shall survive the execution, delivery and performance hereof and thereof, notwithstanding any investigation conducted by any other party hereto at any time with respect thereto, for a period of eighteen (18) months following the Closing Date (the "Survival Period"); provided, however, that all representations and warranties of Seller relating to fraud or title or ownership of the Acquired Assets contained herein shall indefinitely survive the execution, delivery and performance hereof and thereof.

(b) Escrow. The obligation of Seller to pay any Liability which may arise under Section 2.06(b) or this Article VII shall be secured solely by the Escrow Deposit in accordance with that certain escrow agreement entered into on the date hereof by Purchaser and Seller, the form of which is attached hereto as Exhibit 7.04(b) (the "Escrow Agreement"). The term of the Escrow Agreement shall commence on the Closing Date and shall continue until the later of the expiration of the Survival Period or resolution of any and all indemnification Claims received by Seller prior to the expiration of such Survival Period. As soon as practicable following the termination of such Escrow Agreement in accordance with the provisions of this Section 7.04(b) and the Escrow Agreement, Seller shall receive (or a liquidating trust on behalf of Seller, if applicable, shall receive) the remaining balance of the Escrow Deposit in accordance with the terms of the Escrow Agreement.

(c) Payment of Claims. All Claims for indemnification asserted under this Agreement against Purchaser by Seller shall be paid by Purchaser in cash within ten (10) Business Days after such amount is finally determined either by mutual agreement of the parties or pursuant to the final determination thereof by a court of competent jurisdiction. All Claims for indemnification asserted under this Agreement against Seller by Purchaser (other than those relating to fraud or title or ownership of the Acquired Assets) shall be made solely against, and shall be satisfied solely by a return to Purchaser of all or a portion of the Escrow Deposit in accordance with the terms of the Escrow Agreement.

(d) Deductibles. Notwithstanding anything to the contrary contained in this Agreement or the Escrow Agreement, neither Purchaser (nor any other Person entitled to indemnification from Seller) shall be entitled to indemnification from Seller under this Agreement with respect to any Claim unless and until the aggregate amount of all such Claims, plus the aggregate amount of all indemnity claims against OG under the OG Purchase Agreement, combined, exceeds \$100,000 (and then only for amounts in excess of \$100,000).

(e) Exclusive Remedy. The indemnification rights of Purchaser (and any other Person entitled to indemnification from Seller) shall constitute the sole and exclusive remedy of Purchaser and such other Persons with respect to any breach by Seller of this Agreement or any Related Agreement or any cause of action against Seller arising out of the transactions provided for in this Agreement or any Related Agreement; provided, however, that this Section 7.04(e) shall not limit or otherwise restrict (i) any remedies of Purchaser with respect to any actual fraud of Seller or (ii) any right to injunctive or equitable relief with respect to a breach of the Covenant Not to Compete.

## **ARTICLE VIII.** **MISCELLANEOUS**

**Section 8.01. Confidential Information.** The parties hereto agree that they will treat in confidence all documents, materials and other information regarding any other party hereto which it shall have obtained during the course of the negotiations leading to the consummation of the transactions contemplated by this Agreement and the Related Agreements (whether obtained before or after the Closing Date) or the preparation of this Agreement or the Related Agreements. The obligation of each party to treat such documents, materials and other information in confidence shall not apply to any information which: (a) such party can demonstrate was already lawfully in its possession prior to the disclosure thereof by the other party; (b) is known to the public and did not become so known through any violation of a legal obligation; (c) became known to the public through no fault of such party; (d) is later lawfully acquired by such party from other sources; (e) is required to be disclosed under the provisions of any Law or by any stock exchange or similar body; or (f) is required to be disclosed by a rule or order of any court of competent jurisdiction.

**Section 8.02. Public Announcements.** No party shall make any press release, public announcement or other public disclosure concerning the transactions provided for in this Agreement and the Related Agreements, except as expressly agreed upon by all of the parties, unless required by Law or by any stock exchange or similar body, subject to the prior approval of all other parties of the content thereof, which approval shall not be unreasonably withheld or delayed.

**Section 8.03. Expenses.** Except as otherwise specifically provided herein, each of the parties hereto shall pay its own expenses in connection with the negotiation, execution and delivery of this Agreement and the Related Agreements and the transactions contemplated hereby and thereby, including any legal, accounting or other representative or advisor costs and expenses.

**Section 8.04. Notices.** All notices, requests, demands and other communications under this Agreement shall be in writing and shall be delivered to the address set forth below (a) if within the domestic United States by first-class registered or certified airmail, or nationally recognized overnight express courier, postage prepaid, or by facsimile, or (b) if delivered from outside the United States, by International Federal Express or facsimile, and shall be deemed to have been duly given (i) if served personally on the party to whom notice is to be given, on the date of service, (ii) if delivered via facsimile, on the date of transmission to the facsimile number given below, provided that telephonic confirmation of receipt is obtained promptly after

completion of transmission; (iii) if delivered by domestic first-class registered or certified mail, three Business Days after so mailed, (iv) if delivered by nationally recognized overnight carrier, one Business Day after so mailed, and (v) if delivered by International Federal Express, two Business Days after so mailed:

If to Seller, to:

Escient Convergence Corp.  
c/o Escient Technologies, LLC  
6325 Digital Way  
Suite 200  
Indianapolis, IN 46278  
Attention: President  
Tel. No. (317) 814-3030  
Fax No. (317) 846-5848

with a copy to (which copy alone shall not constitute notice for the purposes of this Agreement):

Ice Miller  
One American Square  
Box 82001  
Indianapolis, IN 46282  
Attention: John R. Thornburgh  
Tel. No. (317) 236-2405  
Fax No. (317) 592-4783

If to Purchaser, to:

Digital Networks North America, Inc.  
19 Chapin Road  
P.O. Box 876  
Pine Brook, NJ 07508  
Attention: Dom Golio  
Tel. No. (973) 396-7475  
Fax No. (973) 396-7516

with a copy to (which copy alone shall not constitute notice for the purposes of this Agreement):

Simpson Thacher & Bartlett  
Suite 1850  
10 Universal City Plaza  
Los Angeles, California 91608  
Attention: Daniel Clivner  
Tel. No. (818) 755-9613  
Fax No. (818) 755-7009

Any party may change its address or facsimile number for the purpose of this Section 8.04 by giving the other parties written notice of its new address or facsimile number in the manner set forth above.

**Section 8.05. Headings.** The article, section and paragraph headings in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of any term or provision of this Agreement.

**Section 8.06. Severability.** If any provision of this Agreement is declared by any court of competent jurisdiction to be null, void or unenforceable, this Agreement shall be construed so that the provision at issue shall survive to the extent it is not so declared and that all of the other provisions of this Agreement shall remain in full force and effect.

**Section 8.07. Entire Agreement.** This Agreement and the Related Agreements contain the entire understanding among the parties hereto with respect to the transactions contemplated hereby and supersede and replace all prior agreements and understandings, oral or written, with regard to those transactions. All exhibits and schedules attached hereto are expressly made a part of this Agreement as though completely set forth herein.

**Section 8.08. Amendments; Waivers.** This Agreement may be amended, modified or supplemented, and any of the terms, covenants, representations, warranties or conditions herein may be waived, only by a written instrument executed by each of the parties hereto, or in the case of a waiver, by the party waiving compliance. Any waiver by any party of any condition, or of the breach of any provision, term, covenant, representation or warranty contained in this Agreement, in any one or more instances, shall not be deemed to be or construed as a further or continuing waiver of any condition or of the breach of any other provision, term, covenant, representation or warranty of this Agreement.

**Section 8.09. Parties in Interest; Third Party Beneficiary.** Nothing in this Agreement, expressed or implied, is intended to or shall (a) confer on any Person other than the parties hereto and their respective successors, assigns and Affiliates any rights (including any Third Party beneficiary rights), remedies, obligations or liabilities under or by reason of this Agreement or (b) constitute the parties hereto as partners or as participants in a joint venture. No Third Party shall have any right (independent of any right that exists irrespective of this Agreement) under this Agreement to bring any suit at law or equity for any matter governed by or subject to the provisions of this Agreement. Nothing in this Agreement shall be construed as giving to any New Purchaser Employee, or any other individual, any right or entitlement under any Benefit Plan, policy or procedure maintained by Seller, except as expressly provided in such Benefit Plan, policy or procedure. No Third Party shall have any rights under Section 402, 503 or

504 of ERISA or any regulations thereunder because of this Agreement that would not otherwise exist without reference to this Agreement.

**Section 8.10. Successors and Assigns.** No party hereto shall assign or delegate this Agreement or any rights or obligations hereunder without the prior written consent of the other parties hereto, and any attempted assignment or delegation without the necessary prior written consent shall be void and of no force or effect; provided, that such consent shall not be required in the case of a proposed assignment or transfer to an Affiliate of Purchaser; and provided, further, that Seller may assign its rights and interests hereunder to one or more creditors of Seller after the Closing Date or pursuant to the terms and conditions of a liquidating trust agreement in connection with the termination of its operations after the Closing Date. This Agreement shall inure to the benefit of and shall be binding upon the successors and permitted assigns of the parties hereto.

**Section 8.11. Governing Law; Jurisdiction; Jury Trial Waiver.** This Agreement shall be governed by, and construed and interpreted in accordance with, the law of the State of New York. Each of the Parties hereby irrevocably submits to the exclusive jurisdiction of the United States District Court for the Southern District of New York located in the borough of Manhattan in the City of New York, or, if such court does not have jurisdiction, the Supreme Court of the State of New York, New York County, for the purposes of any suit, action or other proceeding arising out of this Agreement. Each of the Parties hereby further agrees that service of any process, summons, notice or document by U.S. registered mail to its address set forth in Section 8.04 shall be effective service of process for any action, suit or proceeding in New York with respect to any matters to which it has submitted to jurisdiction as set forth above in the immediately preceding sentence. Each of the Parties hereto irrevocably and unconditionally waives, to the extent permitted by applicable law, any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement in (a) the United States District Court for the Southern District of New York or (b) the Supreme Court of the State of New York, New York County, and hereby further irrevocably and unconditionally waives, to the extent permitted by applicable Law, and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum. To the extent permitted by applicable Law, each of the parties waives the right to trial by jury in any such action or proceeding.

**Section 8.12. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute the same instrument.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed, or caused to be executed by their duly authorized representatives, this Agreement as of the date set forth in the first paragraph of this Agreement.

"SELLER"

ESCIENT CONVERGENCE CORP.

By: 

Printed: Scott A. Jones

Title: Chairman

"PURCHASER"

DIGITAL NETWORKS NORTH AMERICA, INC.

By: \_\_\_\_\_

Printed: \_\_\_\_\_

Title: \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have executed, or caused to be executed by their duly authorized representatives, this Agreement as of the date set forth in the first paragraph of this Agreement.

**"SELLER"**

**ESCIENT CONVERGENCE CORP.**

By: \_\_\_\_\_

Printed: \_\_\_\_\_

Title: \_\_\_\_\_

**"PURCHASER"**

**DIGITAL NETWORKS NORTH AMERICA, INC.**

By: \_\_\_\_\_

Printed: Paul Sedun

Title: COB - Dms

## **LIST OF EXHIBITS**

2.06	February Statement of Net Assets
3.02(d)	Bill of Sale
3.02(e)	Assignment and Assumption Agreement
3.02(f)	Intech Letter Agreement
3.02(h)	Covenant Not to Compete
3.02(k)	Consulting Agreement
3.02(n)	Furniture, Equipment and Systems Letter Agreement
3.03(m)	Guaranty
- 7.04(b)	Escrow Agreement

## **LIST OF SCHEDULES**

1.01	Assigned Contracts
1.03	Permitted Encumbrances
2.01	Certain Tangible Acquired Assets
2.03(k)	Miscellaneous Excluded Assets
2.04(iii)	Accounts Payable
2.04(v)	Accrued Expenses
2.08	Allocation of Purchase Price
3.02(g)	Key Employees
3.02(i)	Non-Competition and Option Employees
3.02(k)	Certain Consents to Assignment
3.02(l)	Option Employees
3.02(m)	Consents to Assignment
4.04	Required Consents and Approvals
4.05	Financial Statements
4.06	Absence of Certain Changes or Events
4.07	Tax Matters
4.08	Other Undisclosed Liabilities
4.11(a)	Registered IP
4.11(b)	Actions; Restrictions on Transfers; Encumbrances
4.11(c)	Required Actions
4.11(d)	Title/License to Use Intellectual Property
4.11(e)	IP Licenses/Agreements
4.11(f)	Infringements
4.11(g)	Security/Integrity of Systems
4.12	Labor Relations
4.13	Benefit Plans
4.14	Licenses and Permits
4.15	Business Insurance
4.16(a)	Material Contracts
4.16(b)	Assigned Contracts in Default
4.16(c)	Consents Not Obtained
4.17	Largest Customers/Suppliers

4.18	Compliance with Laws
4.19	Litigation
4.20	Title to Acquired Assets
4.21	Real Property
4.23	Broker's and Finder's Fees
4.25	Capitalization
4.26	Product Warranties
6.02	Former Seller Employees
6.03	COBRA Beneficiaries
6.04	Accrued Vacation

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